

RECEIVED

STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES
WATER COUNCIL

OCT 11 2004

04-19 WC

NOTICE OF APPEAL BY TOWN OF NEWPORT
15 SUNAPEE STREET
NEWPORT, NH 03773

IN RE: THADDEUS DYMON REQUEST FOR WAIVER OF ENV-Ws 386.56 AND DES DECISION

NOW COMES the Town of Newport ("Town"), by and through its attorneys Gardner
Fulton & Waugh P.L.L.C., and respectfully states as follows:

BACKGROUND

1. For approximately 100 years, Gilman Pond in the Town of Unity has served as the primary water supply for the Town of Newport. The pond is small, approximately 68 acres in area, and located in a rural, isolated location. Having been protected in its natural state for the 100± year period, it is pristine and undisturbed by any development or human use on or near its shoreline. The Town has managed to maintain excellent water quality by establishing and enforcing use restrictions around the pond. The NH Department of Environmental Services ("DES") found that, since at least 1899, there have been regulations to protect the purity of the pond water, which regulations have been updated and amended from time to time. See Exhibit A, Decision of DES, September 10, 2004. In their current form, they can be found in Env-Ws 386.56.

2. In addition, the Town has invested millions of dollars in the past 100± years to protect the pond water and filter it for human consumption. For example, in the early 1900s, it

acquired all of the land surrounding the pond from private landowners in order to maintain complete control of access to the perimeter of the pond and the use of the pond. Later, it acquired larger tracts of land in the watershed of the pond, so it currently owns approximately 300 acres around the pond. See Town of Unity tax map, Exhibit B. More recently, as required by federal and state law, it constructed a water filtration plant, which was designed to perform consistent with the long-standing good quality of the incoming water.

3. In 1972, Thaddeus Dymon and his brother, Edward, purchased approximately 28 acres of land with a house near the pond on Unity Springs Road as tenants in common. See Exhibit B. Twenty years later, in 1992, they proposed a subdivision of this land to the Unity Planning Board. The preliminary plan showed their property as bordering on Gilman Pond, with a swimming beach and/or boat docking facilities, and also showed a total of approximately 37 acres to be subdivided. As the Town was an abutter, the Town appeared at the preliminary public hearing held on the proposed subdivision in June 1993 and objected to the proposed plan. The Town cited a number of reasons, including the following: a) the plan was inaccurate in showing the true boundaries of the Dymon land vis-à-vis the Town's land, b) the Town owned the land in fee on the perimeter of the pond between the Dymon land and the natural high water mark of the pond based on a 1966 survey, c) Gilman Pond was a public water supply with restrictions in its use and access to the pond, and d) the Town was concerned about the protection of its watershed and intended to do everything possible to protect the water quality of the pond.

4. Because of concern over the disputed land boundaries and protection of the pond, the Town then engaged a surveyor to complete a survey of all Town-owned land around the pond.

5. By the mid-1990s, the extensive and complicated survey of the entire watershed owned by the Town (which included aerial topographical work) was almost completed. The surveyor, Roy Sabourn, determined the boundaries between the Dymons' and the Town's land. He also found that, on the date of taking measurements (12/17/93), no water reached the Dymon land. On the other hand, he concluded that water from the pond, when flooded, created a strip of land (approximately 300 feet in length) owned by the Dymons that now abutted the edge of the pond. The Town's land, previously the protective perimeter north of the Dymons' land, was confirmed as being mostly submerged when flooded. In addition, a number of ambiguous boundary lines with various landowners came to light.

6. In 1995, the Newport Town Meeting approved a warrant article authorizing the Town to acquire the remaining land around Gilman Pond. The Town initially sought to enter into boundary line agreements with all of the landowners in the area, including the Dymons, to resolve any potential boundary line disputes. For the next several years, the Town and landowners resolved boundary line issues consistent with the new survey, and boundary line agreements were executed and recorded. But with the Dymons, no agreement could be reached. The Town informally offered to purchase either the entire parcel or at least the land nearest the edge of the pond from the Dymons in order to maintain its historic ownership of the entire perimeter of the pond and to continue its complete protection of water quality. All offers were rejected by the Dymons.

7. Finally, when all other options appeared at a dead-end, the Town took steps to begin eminent domain proceedings to take the land nearest to the water's edge on the Dymon property. One of these steps included retaining an expert to study the minimum buffer zone needed to protect the Town's raw surface water supply. In October 2001, the study

recommended that the Town obtain all land within 300 feet of the high water mark of Gilman Pond in order to adequately protect the water.

8. However, the Town had to halt the eminent domain proceedings to wait out litigation between the Dymon brothers as they battled each other in court over their respective interests in the property. Eventually, in late 2002, the litigation concluded with Thaddeus Dymon buying out his brother's interest.

9. After obtaining an updated appraisal, in 2003 the Town re-initiated eminent domain proceedings to take a 6.31-acre piece of land from Thaddeus Dymon, which represented the 300-foot setback from the natural high water mark pursuant to the study's recommendations. In spring of 2004, a petition was filed at the Sullivan County Superior Court requesting a declaration of taking and an assessment of damages as compensation. In response, Thaddeus Dymon filed an answer challenging the public necessity for the taking, challenging the use restrictions that had been in place for the past 100± years, and claiming to own a larger area of land bordering on the pond than shown on the Town's survey, among other things.

WAIVER REQUEST TO DES AND DECISION

10. Simultaneously with his answer to the Town's petition at superior court, on June 1, 2004, Mr. Dymon filed a request for a waiver of the use restrictions in Env-Ws 386.56 with the DES to allow for swimming, fishing and boating on the pond. On June 25, 2004, the Town objected to the waiver request. On or about July 7, 2004, Mr. Dymon responded to the Town's objection, and on September 10, 2004, DES issued a decision.

11. The DES decided to deny Mr. Dymon's request with respect to any activity in or on the pond itself (swimming, boating and fishing) but decided to allow, for the first time, shoreline fishing from his property.

12. Even though the DES decision falls far short of the waiver sought by Mr. Dymon for use of the pond and may appear to some, on its face, to be a harmless concession, the Town believes the decision is contrary to DES rules and regulations, inconsistent with the history of enforcement of use restrictions for more than 100 years, creates new opportunities for harm to the public interest and foreseeable damage to the pond's water quality, and the decision should be reversed.

SUMMARY OF ISSUES IN APPEAL

13. The decision contradicts restrictions in Env-Ws 386.56 designed to protect the pond's water quality from any potential contaminants, which have succeeded to date in doing so.

Three restrictions specifically relate to shoreline fishing:

(3) A person shall not throw or deposit any dead animal, fish or parts thereof, or food or any article perishable or decayable, or any dung, either human or animal, kitchen waste, swill or garbage into Gilman Pond, or leave or permit any such wastes to remain within 200 feet of the high water mark thereof, or into any inlet of Gilman Pond or within 200 feet of such inlet;

(12) A person shall not bathe, wade, swim, water-ski, or perform any similar water contact activity in Gilman Pond or any stream tributary thereto;

(18) A person shall not boat or fish in Gilman Pond or any stream tributary thereto.

The first restriction, Env-Ws 386.56(3), addresses activity *on the shore* and prohibits the depositing of any food or dead fish or dead fish parts within 200 feet of the high water mark. Restriction (12) restricts any wading along the shoreline, an activity commonly associated with shoreline fishing when there are weedy, boggy or muddy areas near a water body (such as exist on or near the Dymon property). And Restriction (18) *flatly prohibits all fishing* in the pond. The Town has relied upon these, and all other, restrictions to ensure that every reasonable effort is made to protect its water supply from *any* potential human-caused contamination.

14. The DES decision thus undermines the consistent efforts of the Town, for the past 100+ years (going back to at least 1899), to maintain complete control over the entire perimeter of Gilman Pond and makes its job to enforce the use restrictions more difficult, and even impossible. The fact that the Dymon property is privately owned in a town with no zoning means that, even though it is now used as a vacation home for Mr. Dymon, its use (and ownership) can be changed at any time, including to a much more intensive use including commercial. With the DES waiver, it appears that Mr. Dymon may even invite the general public to fish from his shoreline for a fee. Unfortunately, the Town and Mr. Dymon are currently involved in a boundary line dispute, and Mr. Dymon claims to own a larger area of shoreline and land than the Town believes to be accurate, which only heightens the Town's concern as to potential risk of contaminants to the water quality due to the DES decision. It's the beginning of heading down a slippery slope—a slope that the Town has spent hundreds of thousands of dollars over the years to avoid even getting near. It has tried to hold the line, consistently, to avoid any human-caused potential contamination. How does the Town ensure that food and beverage cans from people engaged in shoreline fishing do not end up in, or near, the pond? How does the Town ensure that dead fish, or dead fish parts, do not end up in, or near, the pond from careless handling? Or, how does the Town ensure that Mr. Dymon and his guests (an undefined term) do not wade in the pond near the shoreline in order to find better fishing opportunities beyond any weedy, muddy areas? And now that one private individual is given a waiver, limited as it is, at which new point does the proverbial line in the sand get drawn when the next waiver request comes in? The DES decision has foreseeable consequences that undermine the rules the DES, jointly with the Town, is supposed to apply consistently and enforce.

15. The unfortunate fact that Mr. Dymon owns any shoreline at all along the pond is an historical anomaly and certainly inadvertent, which fact was not confirmed until the mid-1990s. (How it occurred, when it first occurred, and how often it still occurs and any duration, is uncertain.) Since then, the Town has attempted to resolve that issue through non-litigious means by offering to purchase the new area that, when flooded, becomes the perimeter of the pond in order to maintain its historic water quality control efforts. Even though DES concluded that shoreline fishing from the Dymon property carried minimal risk of contamination, it still obviously carries *more risk* of contamination than ever before permitted or contemplated. To the extent more contaminants are found in the pond water as a result of this new waiver, it is the Town (not DES nor Mr. Dymon) that will have to address and solve those additional contamination problems, at its own cost and effort. The public interest in protecting water quality by every reasonable means possible was sacrificed for the benefit of one private party, Mr. Dymon.

16. The inconsistency of the DES decision with the public interest is apparent when contrasted with its statutory and regulatory obligations. RSA 485:1, II(e), with regard to a comprehensive drinking water protection program, states that DES “*shall ... [r]equire* that public water supplies comply with all pertinent federal and state statutes and rules.” (Emphasis added.) Env-Ws 386.56(a) then states that the purpose of this particular set of rules is “to protect the purity of water of Gilman Pond, which is the principle drinking water supply for the town of Newport.” The list of 18 restrictions is designed to implement that purpose and RSA 485:1. Moreover, Env-Ws 386.56(f) states that “[a]ny deviations from these rules shall be by written consent of the division *and the town of Newport* in accordance with Env-Ws 386.04.” (Emphasis added.) The Town of Newport did not consent to any deviation. It objected. Obviously, any risk

of potential contamination by a waiver of the restrictions will be borne by the Town by virtue of its own obligations to supply clean drinking water to its residents in Newport and to the residents in the Town of Unity who are also served by Gilman Pond. DES recognized in its decision that the restrictions listed in Env-Ws 386.56(f) are consistent with the best management practices and policies of the water works industry for protection of public water supplies. Exhibit A at page 3, ¶5. DES also acknowledged that “the presence of filtration does not eliminate the need for other protective measures but rather *completes* this protection system.” *Id.* at page 5, ¶11 (emphasis added). The DES decision to grant even a limited waiver of these restrictions is not, therefore, consistent with its statutory and regulatory obligations.

17. The DES decision also contradicts consistent recommendations made by DES to the Town that it should continue its acquisition of property in order to control the Gilman Pond watershed. The Town has faithfully attempted to fulfill that goal for many years, at considerable cost when funds and opportunity permitted, in order to protect water quality. The fact that Mr. Dymon is, now, the only private landowner left on the pond was unintentional and inadvertent, and Mr. Dymon’s insistence that he has a right to fish, swim or boat on the pond makes the need to acquire that remaining private shorefront property all the more urgent. It certainly does not justify a waiver of the use restrictions for the first time in 100+ years. Indeed, for DES to grant a waiver of the use restrictions to this one private landowner, whose land is now subject to eminent domain proceedings in order for the Town to implement and complete its mission of controlling the watershed, is incongruous and illogical.

18. The DES decision is even more baffling when Mr. Dymon’s interests in the use of the pond (to the extent any water reaches his property from time to time) are not grandfathered. Mr. Dymon purchased the property in 1972, almost a quarter of a century after the first use

restrictions were put into place for Gilman Pond. As far as the Town is aware, his property did not contain any shoreline property at the time. But even if it did, Mr. Dymon purchased the property subject to the use restrictions and cannot claim that he has suffered unnecessary hardship due to those restrictions. He never had a right to shoreline fishing (let alone boating, swimming and in-pond fishing) to begin with, nor at any time thereafter.

19. Finally, Mr. Dymon's waiver request did not meet the requirements of Env-Ws 386.04(b)(2) in the first place, so the DES decision to grant a partial waiver in response to Mr. Dymon's request was unsupported. That rule states that each request for a waiver and determination of essential compliance shall include:

- a. A specific reference to the paragraph of the section for which a waiver is being sought;
- b. A full explanation of why a waiver is necessary and demonstration of hardship caused if the rule is adhered to;
- c. A full explanation of the alternatives for which a waiver is sought, with backup supporting data; and
- d. A full explanation of how the granting of the waiver is consistent with the intent of RSA 485:24 and RSA 485:25 and would have a just result.

Though Mr. Dymon met the requirement of subparagraph (a), he failed to explain why a waiver was "necessary" nor did he demonstrate any "hardship," as required by subparagraph (b). Indeed, DES explicitly found this requirement had *not* been met. Exhibit A, Order at page 2, ¶1. An occasional recreational use, which was the only rationale offered by Mr. Dymon as grounds for the waiver, cannot be characterized as driven by "necessity" or "hardship" sufficient to warrant a waiver of the rules in the first time in their history. More importantly, his request completely failed to address foreseeable impacts of any waiver due to his use of the pond (including that of his extended family and "guests"), or its use by others if he tries to and succeeds in selling his property to a third party with the waiver in effect. So, too, Mr. Dymon completely failed to offer a "full explanation of the alternatives for which a waiver is sought, with backup supporting

data.” Env-Ws 386.04(b)(2)(c). No alternatives were offered, and no data was supplied at all. Mr. Dymon did not provide a full explanation of how granting the waiver would be consistent with the intent of RSA 485:24 and 25 and have a just result, because subparagraph (d) requires the information in subparagraphs (b) and (c) to support such a conclusion in the first place. Though DES came to its own surprising conclusion based on its own data that a waiver could be granted, it did not do so as a result of the *applicant* meeting the requirements of Env-Ws 386.04. Moreover, DES’s conclusion was made unilaterally, over the Town’s objection, despite the fact that Env-Ws 386.56 explicitly requires the written consent of both DES and the Town before any deviations from restrictions may be granted.

20. As the eminent domain proceeding with a portion of Mr. Dymon’s property is at very early stages and Mr. Dymon is challenging the public necessity of the taking, the Town reserves the right to raise additional grounds, including but not limited to issues related to potential contamination by the waiver and to respond to any allegations raised by Mr. Dymon related to his waiver request and the DES decision.

WHEREFORE, the Town of Newport respectfully requests that the Water Council:

- A. Reverse the September 10, 2004 decision of DES and deny all waivers of the restrictions in Env-Ws 386.56 based on all of the above;
- B. To schedule a hearing after such time as the Town has the necessary discovery and sufficient opportunity to retain experts to testify in support of its appeal; and
- C. For such other and further relief as is just and equitable.

DATED this 8th day of October, 2004.

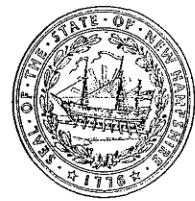
Respectfully Submitted,
THE TOWN OF NEWPORT
By its attorneys

COPY


Adele M. Fulton, Esq.
GARDNER FULTON & WAUGH P.L.L.C.
78 Bank Street
Lebanon, NH 03766-1727
(603) 448-2221



The State of New Hampshire
Department of Environmental Services



Michael P. Nolin
Commissioner

September 10, 2004

Attorney Daniel G. Smith
Law Offices of Daniel G. Smith
23 Bank Street
Lebanon, NH 03276

Re: Request for Waiver of Restrictions for Thaddeus Dymon for Gilman Pond, Unity

Dear Attorney Smith:

By letter dated June 1, 2004, representing Mr. Thaddeus Dymon of 13 Fairway Drive, Ludlow Massachusetts, you requested a waiver pursuant to Env-Ws 386.04 to allow swimming, fishing and boating by Mr. Dymon and others on Gilman Pond in Unity, New Hampshire. Gilman Pond is the Town of Newport's surface water supply reservoir. Mr. Dymon is an owner of land adjacent to Gilman Pond. Specifically, a waiver was requested of Env-Ws 386.56(h)(12) bathing, swimming and water-skiing; (14) tying, beaching or grounding of boats; and (18) boating and fishing in Gilman Pond.

Two additional letters were received concerning this request:

- A letter dated June 25, 2004 from Attorney Adele Fulton representing the Town of Newport; and
- A letter dated July 6, 2004 from you concerning the information in Attorney Fulton's letter.

WAIVER REQUEST CRITERIA

Under Env-Ws 386.04(b)(2), "a request for a waiver and determination of essential compliance shall include the following information:

1. A specific reference to the paragraph for which the waiver is sought.
2. A full explanation as to why the waiver is necessary.
3. A demonstration of hardship caused if the rule is adhered to.
4. A full explanation of the alternatives for which the waiver is sought with backup supporting data, and
5. A full explanation of how the granting of the waiver is consistent with the intent of RSA 485:24 and RSA 485:25 and would have a just result."

The Division finds that the information provided in your letter dated June 1, 2004 meets the minimum informational requirements to render a decision on the waiver request.

EXHIBIT A

P.O. Box 95, 29 Hazen Drive, Concord, New Hampshire 03302-0095
Telephone: (603) 271-3503 • Fax: (603) 271-2982 • TDD Access: Relay NH 1-800-735-2964
DES Web site: www.des.nh.gov

DECISION CRITERIA

Under Env-Ws 386.04(b)(3), "The division shall approve a request for waiver upon finding that:

1. The proposal is at least equivalent to the specific requirement in the rule, or
2. If the proposal was not equivalent to the requirement contained in the rule, it shall be adequate to ensure that the intent of RSA 485:24 and RSA 485:25 is met."

Also, under Env-Ws 386.04(c), "no waiver shall be granted which, in the judgment of the division contravenes the intent of the rules."

DECISION AND FINDINGS

The waiver request is **DENIED**, except that land-based fishing will be allowed from the Dymon property, based on the following findings:

1. The Division finds that no hardship has been demonstrated as required by Env-Ws 386.04(b)(2) to the extent that the rule should be waived.
2. The Division finds that the proposal is not equivalent to the specific requirements in Env-Ws 386.56(h), Protection of the Purity of Gilman Pond. Allowance of additional recreational use on Gilman Pond, including body contact recreation and boating, does not afford protection equivalent to the existing restrictions. This would also be inconsistent with well-recognized best management practices in the water works industry for water quality protection.
3. The Division finds that a waiver to allow body contact by swimming, waterskiing or other recreation on Gilman Pond would contravene the intent of the rule by exposing the drinking water supply to additional risk of waterborne contamination.
4. The Division finds that a waiver to allow boating on Gilman Pond would contravene the intent of the rule by exposing the drinking water supply to additional risk of waterborne contamination.
5. The Division finds that it is reasonable to allow land-based fishing from the shore of the Dymon property, which is located on the opposite end of the pond from Newport's water supply intake.
6. RSA 485:24, I, in part states that "In response to a petition, or upon its own motion, the department shall adopt such rules under RSA 541-A as it may deem best to protect the water or ice supply against dangerous contamination." The Division finds that the existing rule is deemed best to protect the water supply because the rule ensures the presence of multi-barrier protections advocated by the United States Environmental Protection Agency to ensure compliance with the

Safe Drinking Water Act and is consistent with the purpose of Env-Ws 386 and best management practices of the New England waterworks industry.

7. RSA 485:25 provides DES with authority to adopt rules pertaining to protection of purity of interstate waters at the request of adjoining states. Gilman Pond is not an interstate water. Accordingly, the Division finds that RSA 485:25 is not practically relevant to the rules pertaining to Gilman Pond and, therefore, is not a factor in this decision.

DISCUSSION

1. Under Env-Ws 386.01, "the purpose of these rules is to recognize the importance of those surface water supplies that are used as sources of public water supply and to provide methods for reasonable watershed management so as to maintain high levels of water quality." The Division has concluded that current rules contained in Env-Ws 386.56(h) coupled with other existing protective measures by the Town of Newport, including land ownership, provide reasonable watershed management so as to maintain high levels of water quality for the reasons discussed below.
2. Gilman Pond, located in Unity, New Hampshire, is the water supply reservoir for the Town of Newport. The pond is approximately 68 acres in area. Most of the land surrounding the pond is owned by the Town of Newport for purposes of water supply protection. Only one property, owned by Mr. Dymon, located on the southern end of the pond is privately held.
3. Env-Ws 386.56(h), Protection of the Purity of Gilman Pond, in its current form has been in effect since June 4, 1997. Predecessor agencies, including the Water Supply and Pollution Control Commission and the State Board of Health, have had similar restrictions since at least 1899 for Gilman Pond.
4. By letter dated June 25, 2004 from its attorney, Adele Fulton, the Town of Newport has objected to approval of the requested waiver.
5. Env-Ws 386.56(h) is consistent with the best management practices and policies of the water works industry for protection of public water supplies. New England water works policy is presented in the December 1995 Final Revised Policy of the New England Water Works Association (NEWWA) entitled "Resolution & Policy Concerning Recreational Use of Public Water Supplies." In this policy, NEWWA states in part that "public water suppliers support the concept of multiple barrier protection of drinking water supplies to maximize public health by: 1. Source water protection, 2. Treatment, which may include filtration, 3. Preservation of finished water, 4. Monitoring, 5. Training and certification." Multiple barrier protection to ensure safe drinking water is also supported by the American Water Works Association (AWWA) and the US EPA. In the NEWWA policy, terminal and primary storage reservoirs are "*reservoirs and reservoir*

system components providing principal and/or end storage of water prior to treatment and delivery of finished water to the distribution system.” The NEWWA policy further states “recreational use of terminal reservoirs and adjacent land is contrary to the basic function of furnishing safe, palatable water supply to customers and should be prohibited to the greatest extent possible, but, in no event should direct contact with the reservoir be allowed. In addition, activities allowed to occur on adjacent lands should prohibit contact with water in the reservoir.” NEWWA policy summarizes standard industry practice (best management practices) for New England water suppliers.

6. Gilman Pond is a small (69 acres) primary storage reservoir as defined in the NEWWA policy. Env-Ws 386.56 (h), the DES rules for Gilman Pond, are consistent with NEWWA Policy for primary storage reservoirs.
7. Numerous other water suppliers in New Hampshire, through DES regulation, as well as in other New England states have restrictions as stringent as those in Gilman Pond on water supply reservoirs to protect and preserve drinking water quality, and which are consistent with NEWWA policy.
8. In New Hampshire, all 25 terminal reservoirs that are 160 acres or smaller prohibit swimming.
9. The American Water Works Association (AWWA) policy on “Recreational Use of Domestic Water Supply Reservoirs,” revised June 23, 1996, states in part that *“It should be recognized that uncontrolled recreational use of domestic water supply can result in deteriorated water quality which increases the potential for a waterborne disease to occur...The decision concerning recreation and the associated treatment should be made by utilities based on water quality concerns, on applicable laws and regulations, and on information provided by AWWA, the US Environmental Protection Agency and other organizations that conduct research and present technical reports. This information should be used to balance and assess public demand for greater utilization of water resources.”*
10. AWWA has published research on recreation use of terminal water supply reservoirs. For example, an article entitled “Predicted Public Health Consequences of Body-contact Recreation on a Potable Water Supply Reservoir” by Mic H. Stewart *et al.* was published in the *Journal of the American Water Works Association*, May 2002. This article described a study on the impacts of direct body contact recreational activities, including swimming and other on-water sports, on water quality. In part, the study concluded *“a modeling-based risk assessment was conducted to assess the potential public health consequences to downstream potable water users consuming water from this reservoir if BC (“direct body contact”) recreation was permitted. Results of the study indicated that the annual risk of waterborne illness would increase three times above background, despite conventional treatment. Moreover, the occurrence of high-loading pathogen events associated with BC recreation was observed to*

significantly increase the daily risk of waterborne illness to downstream consumers."

11. Water from Gilman Pond is treated by slow sand filtration and chlorination prior to delivery to the Town of Newport water system. Slow sand filtration coupled with watershed protection represents a system of multi-barrier protection consistent with water works industry best management practices and as advocated by USEPA. The presence of filtration does not eliminate the need for other protective measures but rather completes this protection system.
12. In a letter dated July 6, 2004, Attorney Smith cites Lake Massabesic, the City of Manchester's water supply source, and Canaan Street Lake, the Town of Canaan's water supply source, as examples of terminal water supply reservoir where recreation is allowed. However, Attorney Smith did not describe the restrictions that exist on these water supplies.
13. Under Env-Ws 386.47, Protection of the Purity of the Water of Lake Massabesic and its Tributaries, some recreation activities are allowed on Lake Massabesic. Boating, fishing and sailing are allowed on the eastern portions of the lake. However, no swimming is allowed anywhere on Lake Massabesic. Also no sailboats, such as "Sunfish", that are prone to tipping are allowed. Furthermore, no human activity whatsoever (no boating, fishing or swimming) is allowed within a restricted area in close proximity of the water supply intake. Lake Massabesic has a total lake area of approximately 2,569 acres. The fully-restricted area is approximately 620 acres, about one-quarter of the lake area and just less than 10 times the size of the 67-acre Gilman Pond. Even with this restricted area, the City of Manchester provides a more sophisticated level of treatment than Newport uses for Gilman Pond, thus maintains a higher level of protection for finished water quality.
14. Env-Ws 386.18, Protection of the Purity of Canaan Street Lake and Its Watershed, applies to the Town of Canaan's water supply. This lake has a size of approximately 290 acres, over four times that of Gilman Pond. Swimming, fishing and boating are allowed on the northern portion of the lake, away from the intake area, in recognition of historic practices on this lake. Similar to Lake Massabesic, no human activity whatsoever (including boating, swimming or fishing) is allowed in an area in the southernmost part of the lake near the water supply intake (approximately 20 acres in this case). This is not an ideal situation for a terminal water supply reservoir. Less-than-ideal practices continue on Canaan Street Lake and some other water supply reservoirs in New Hampshire in recognition of historic recreation practices on these reservoirs. This is effectively equivalent to the allowance of "grandfathered" activities for other environmental programs such as the Shoreland Protection Act and should not be considered the "default" to weaken restrictions on other terminal reservoirs which have maintained more stringent restrictions that are consistent with standard industry practice in New England.

15. In New Hampshire, boating is prohibited on the entire waterbody for the majority (19 of 25) terminal water supply reservoirs with surface areas of less than 160 acres (see Env-Ws 386). Boating increases risk of contamination by increasing the potential for human contact with the water.
16. Boating also increases the risk of contamination by gasoline constituents. In some terminal water supply reservoirs, including Lake Massabesic, low levels of methyl tertiary butyl ether (MtBE) have been detected, particularly in the summer months, with the source being outboard motors. MtBE at the levels typically detected would not be expected to be removed by Newport's slow sand filtration process but are removed by the City of Manchester's treatment plant.
17. The Dymon property is the sole privately-held property on Gilman Pond, with most property controlled by the Town of Newport. This property is located on the southern side of the pond, away from the water supply intake. Shoreline fishing from this one property carries minimal risk of contamination to Newport's water supply. Consequently, the Division has concluded that it is reasonable to grant the requested waiver for land-based fishing from the Dymon property.

Under Env-WC 203, any aggrieved party may appeal this decision to the Water Council. Any appeal must be filed with the Water Council within 30 days.

Sincerely,

COPY

Harry T. Stewart, P.E.
Director, Water Division

cc: Mr. Thaddeus Dymon
Daniel P. O'Neill, Town of Newport
Adele Fulton, Esq.
Michael P. Nolin, DES Commissioner
Michael J. Walls, DES Assistant Commissioner
Paul Susca and Sarah Pillsbury, DES

